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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

BAHMAN HARIRI MOGHADAM, Plaintiff and Appellant, v. CHALON ROAD ASSOCIATES, LLC, Defendant and Respondent.	B282309 (Los Angeles County Super. Ct. No. SC114933)

APPEAL from a judgment of the Superior Court of Los Angeles County, Craig D. Karlan, Judge. Affirmed.

Leo Fasen; The Law Office of Herb Fox and Herb Fox for Plaintiff and Appellant.

Friedman + Taitelman, Michael A. Taitelman and Bradley H. Kreshek for Defendant and Respondent.

Bahman Hariri Moghadam (Moghadam), Trustee of the 808 Ashland Living Trust (Trust) borrowed $1,560,000 from Chalon Road Associates, LLC's (Chalon) predecessor in interest, securing his obligation with an 18-month note and a deed of trust on real property located on Lincoln Boulevard in Santa Monica. The note provided for interest at the rate of 9.9 percent per annum, subject to increase to 19 percent in the event of default.

Moghadam defaulted on the note and Chalon instituted nonjudicial foreclosure proceedings. Moghadam's agent negotiated a forbearance agreement to temporarily halt the foreclosure. Moghadam believed Chalon had orally agreed to modify the interest rate to 10.5 percent until the loan was paid off, irrespective of any default by Moghadam. Based on his understanding of that agreement, Moghadam continued to make monthly interest-only payments for more than a year before stopping, at which time Chalon foreclosed on the Lincoln Boulevard property. Chalon asserted that Moghadam had underpaid most of his interest-only payments as Chalon had begun applying the 19 percent default rate following Moghadam's first default.

Moghadam sued Chalon for breach of contract, negligent and intentional misrepresentation, unfair business practices and other claims, asserting that Chalon breached the forbearance agreement by applying the 19 percent default rate instead of the agreed-upon 10.5 percent interest rate, misrepresented its intention to accept payments based on the 10.5 percent interest rate, and wrongfully foreclosed on the Lincoln Boulevard property. The trial court entered summary judgment in favor of Chalon on the ground the forbearance agreement, which was silent as to the amount of interest, was an integrated contract,

and Moghadam would have been subject to foreclosure even had he not signed the forbearance agreement.

We affirm as to Moghadam's causes of action for breach of contract, negligent misrepresentation, intentional misrepresentation, and violation of Business and Professions Code section 17200 et seq.[1] Based on the undisputed facts, Moghadam never made any payments to Chalon based on a 19 percent interest rate, and the trustee's sale of the Lincoln Boulevard property generated less than the amount Moghadam owed on the note. Accordingly, Moghadam suffered no damage as a result of Chalon's alleged conduct, and the trial court properly granted summary judgment in Chalon's favor.

FACTUAL AND PROCEDURAL BACKGROUND

The Trust owned commercial property located at 2903-2907 Lincoln Boulevard (Lincoln Property) and vacant land located at 802 Ashland Avenue (Ashland Property). The Ashland Property is located on a hill directly behind, and contiguous with, the Lincoln Property. The value of the two properties, if developed together as a single mixed-use project, is greater than the value of the individual properties.[2]

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[1] Moghadam makes no challenge to the judgment as it relates to his fifth through ninth causes of action. Accordingly, any challenges to these claims are forfeited. (*Christoff v. Union Pacific Railroad Co.* (2005) 134 Cal.App.4th 118, 125.)

[2] Shortly before filing this action, Moghadam entered into a purchase agreement with a third party to sell both properties for $4,750,000.

I. The Loan

In May 2006, Moghadam borrowed $1,560,000 from Lone Oak Fund LLC (Lone Oak) and executed a promissory note secured by a deed of trust and assignment of rents on the Lincoln Property.[3] The note provided for interest to accrue on the principal amount at the initial rate of 9.9 percent per annum. If Moghadam defaulted on his obligations, the interest rate on the unpaid balance would increase to 19 percent until paid in full, regardless of subsequent cure.

The deed defined "Events of Default" to include: (1) Moghadam's failure to pay any installment of interest or principal under the note when due, "whether on maturity, the date stipulated in any Loan Document, by acceleration, or otherwise"; and (2) his failure to pay all taxes before they became delinquent.

II. Chalon Initiates Foreclosure Proceedings and the Parties Negotiate a Forbearance

The note initially matured on November 30, 2007, at which time the balance of principal and interest was due and payable. On December 3, 2007, Moghadam and Lone Oak modified the loan in writing to extend its maturity date to December 31,

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[3] The note was also secured by the personal guaranty of Moghadam's brother, George Hariri Moghadam (George). Chalon cross-claimed against George to enforce the guaranty, but the cross-complaint is not the subject of this appeal. We refer to George by his first name solely to distinguish him from Moghadam and intend no disrespect.

2007.[4] The parties also agreed to increase the interest rate from 9.9 to 10.5 percent for the period of December 1, 2007 to December 31, 2007 *only*.

Moghadam did not pay the balance of the loan by its maturity date of December 31, 2007. Notwithstanding the expiration of the maturity date, Moghadam made more than 30 subsequent monthly payments of $13,650 on the loan, each of which represented an interest-only payment on the principal amount of $1,560,000 at the rate of 10.5 percent per annum.

Lone Oak assigned the note to Chalon on November 18, 2008.

On February 12, 2009, more than a year after the loan matured, Chalon commenced nonjudicial foreclosure proceedings against Moghadam by serving and recording a notice of default and election to sell under deed of trust.

After the notice of default was served and recorded, George, acting as Moghadam's agent, asked Chalon's principal, Eric Maman, why the notice indicated an amount due of $1,718,120, which was more than $150,000 in excess of the principal balance of $1,560,000. According to George, Maman stated the excess amount consisted of "default interest" on the loan. George told Maman that, if Chalon intended to apply the 19 percent default interest rate to the loan payments, the property's value would not justify further efforts to keep the property. In that event, Moghadam would sign a deed in lieu of foreclosure rather than making further payments. Maman told George that Chalon

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[4] Moghadam erroneously alleged in his first amended complaint that the loan modification extended the maturity date to November 2008.

preferred to receive the monthly interest payments and would "work with" Moghadam.

In June 2009, George, as agent for Moghadam, negotiated a forbearance of the foreclosure proceedings with Maman. An initial draft of the forbearance agreement contained Moghadam's acknowledgement that the principal amount due and owing to Chalon was $1,772,450, which included unpaid interest of approximately $212,450. The draft also provided that interest would accrue on the unpaid balance "at the default rate of 19 [percent] per annum."

George objected to inclusion of the language regarding the interest rate and amount due and owing, offering, on behalf of Moghadam, to provide Chalon with a deed in lieu of foreclosure if Chalon insisted on applying the 19 percent default interest rate. George told Maman the only way Moghadam would sign the forbearance agreement was if the "unacceptable language" regarding the 19 percent default rate was deleted. The final, executed version of the forbearance agreement did not contain any reference to either the interest rate or the balance owed by Moghadam.

Moghadam signed the forbearance agreement without reading it and without ever discussing either the negotiation of the agreement or its terms with George. Moghadam expressly acknowledged in the forbearance agreement that he was in default due to his failure to repay the loan by the date of maturity and his failure to pay real property taxes. The agreement contained an integration clause providing that it could not be contradicted by evidence of prior, contemporaneous or subsequent oral agreements of the parties. Additionally, Chalon reserved all rights and remedies under the note and deed of trust,

including, presumably, the right to charge default interest at the rate of 19 percent per annum as provided in the note.

Between September 2009 and July 2011, Moghadam made payments to Chalon in varying amounts ranging from $3,200 to $13,650 per month. Most of these payments were for $13,650, which Moghadam understood to represent an interest-only payment on the $1,560,000 principal at the rate of 10.5 percent per annum.[5]

While Chalon began applying the default interest rate of 19 percent per annum on January 1, 2008, after Moghadam failed to pay the balance of the loan by its December 31, 2007 maturity date, at no time did Moghadam make a loan payment at the rate of 19 percent per annum.

Chalon purchased the Lincoln Property at a trustee's sale on November 21, 2011, and subsequently sold it to a third party for value.

III. Moghadam Sues Chalon

Moghadam, as Trustee of the Trust, filed this action against Chalon for specific performance, breach of contract, intentional misrepresentation, negligent misrepresentation, violation of Business and Professions Code section 17200 (section 17200), declaratory relief, and injunctive relief. Moghadam's amended complaint abandoned his claims for specific performance and injunctive relief and added causes of

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[5] In a June 2, 2009 email, Maman recognized Moghadam's payment of $13,750 as an "overpa[yment]" and stated Chalon would "credit $100 toward the June payment which is now due anyway."

action for wrongful foreclosure, quiet title, and intentional infliction of emotional distress.

Chalon successfully moved for summary judgment, or in the alternative summary adjudication, of each of Moghadam's nine causes of action.

DISCUSSION

I. Standard of Review

We review a "summary judgment de novo, applying the same legal standard as the trial court." (*Anderson v. Fitness Internat., LLC* (2016) 4 Cal.App.5th 867, 876; accord, *Biancalana v. T.D. Service Co.* (2013) 56 Cal.4th 807, 813.) A court must grant summary judgment if the papers submitted show there is no triable issue as to any material fact. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843; see Code Civ. Proc., § 437c, subd. (c).)

A defendant has met its burden of showing that a cause of action has no merit if it demonstrates that one or more elements of the cause of action, even if not separately pleaded, cannot be established, or that there is a complete defense to the cause of action. (Code Civ. Proc. § 437c, subd. (p)(2).) Once the defendant meets this burden, the burden shifts to the plaintiff to prove the existence of a triable issue of fact regarding that element of its cause of action or that defense. (*Ibid.*)

On appeal from a summary judgment, "we independently examine the record in order to determine whether triable issues of fact exist to reinstate the action." (*Wiener v. Southcoast Childcare Centers, Inc.* (2004) 32 Cal.4th 1138, 1142.) In performing our de novo review, we view the evidence in the light

most favorable to the plaintiff as the losing party. (*Ibid.*; accord, *Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768.) In doing so, we liberally construe the plaintiff's evidentiary submissions and strictly scrutinize the defendant's evidence in order to resolve any evidentiary doubts or ambiguities in plaintiff's favor. (*Wiener v. Southcoast Childcare Centers, Inc.*, *supra*, at p. 1142.)

II. No Triable Issues of Material Fact Remain on the Common Element of Damages

A. *Breach of Contract*

We turn first to Moghadam's claim for breach of contract. "[T]he elements of a cause of action for breach of contract are (1) the existence of the contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) the resulting damages to the plaintiff." (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 821.

Chalon argued it was entitled to summary judgment because Moghadam's entire complaint was based on the "false assertion of fact" that Chalon orally agreed it would not charge interest at the rate of 19 percent but "wrongfully" did so. Chalon argued in the alternative that summary adjudication of each of the nine causes of action was appropriate for several reasons, including that Moghadam suffered no damages as a result of Chalon's alleged conduct. Specifically, Chalon asserted that, although interest was charged at the default rate of 19 percent from and after January 2008, Moghadam never paid interest at that rate. Furthermore, even assuming the interest rate applicable to the note was 10.5 percent and not 19 percent, the

amount recovered for the Lincoln Boulevard property upon foreclosure was less than the balance due on the note.

Moghadam filed an opposition, arguing triable issues of fact precluded summary judgment as to the breach of contract, misrepresentation and section 17200 causes of action.[6] However, Moghadam offered no evidence to create a triable issue as to the issue of damages. Critically, Moghadam admitted that, with one exception,[7] he made regular, monthly payments to Chalon in amounts no greater than $13,650, which payments were "calculated upon interest only, at the rate of 10.5 [percent] per annum, on the principal balance of $1,560,000." Moghadam further admitted that the Lincoln Property was sold at a trustee's sale in November 2011 for a credit bid of $1,072,931.88, leaving a deficiency on the note of $631,895.52.

The trial court heard argument on January 17, 2017, and stated its intent to grant the motion in its entirety based on the undisputed fact the forbearance agreement was an integrated document. Additionally, the court indicated Moghadam suffered no damages: "So I'm trying to understand where the damage is here. Where's the reliance? Because, in essence, your client admitted he was in default for two reasons. One is nonpayment of property taxes. The second is failure to repay the loan upon maturity because there was a payoff date. So given that he was in default, the forbearance agreement just said, 'Okay. You have to make these interest payments and continue to make it, and we

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[6] Moghadam presented no argument on his remaining causes of action.

[7] Moghadam made a payment to Chalon of $13,750 in April 2009, which was $100 more than his usual payment of $13,650.

won't foreclose during this period,' and then the agreement expires. Where's the reliance? How did he suffer to his detriment? I'm not following. I'm just not following the plaintiff's case."

In his opening brief on appeal, Moghadam largely avoided the element of damages as it pertains to any of his causes of action, asserting without merit that the trial court erred by "question[ing] reliance, harm and damages suffered by [him.]"

In its responding brief, Chalon noted Moghadam's evasion of the issue, and pointed to several undisputed facts supporting a finding that Moghadam could not establish the element of damages: (1) Moghadam never paid the outstanding principal balance due on the note or the delinquent property taxes; and (2) the sale of the property on foreclosure generated less than the amount left due on the note, so Moghadam lost no equity through the sale. Chalon also cited the undisputed fact that, although Moghadam claimed to have been charged 19 percent interest on the unpaid balance of the note, he only paid interest at the rate of 10.5 percent, the rate he asserts he was promised by Chalon.

We find these undisputed facts are controlling. As the trial court recognized, the forbearance agreement did not change Moghadam's obligation to make timely payments to Chalon, nor did it alter the amount he owed. The agreement merely gave him a brief reprieve from foreclosure: "I'm not hearing anything other than he wouldn't have signed the agreement, and my question to you is—okay. He would still owe the money. [Chalon] could still foreclose. The only thing—the only one who benefits from the agreement is your client because [Moghadam] gets two months' breathing room even though [Chalon] could have foreclosed based on the property tax default. . . . [T]he way I read the forbearance

agreement, it gives your client time, and it doesn't require your client to do anything other than make the payments [Moghadam] was already required to make. So if it gives him time and there's nothing required of him other than that which he was legally obligated to do under the prior agreements, where does that leave us? Which is no damages. No reliance."

We conclude the trial court properly found that there was no triable issue of material fact with respect to Moghadam's breach of contract action and Chalon is entitled to judgment as a matter of law as to that claim. Damages are an essential element of a breach of contract claim. (*Behnke v. State Farm General Ins. Co.* (2011) 196 Cal.App.4th 1443, 1468.) The statutory measure of damages for breach of contract is "the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom." (Civ. Code, § 3300.) "Contract damages are generally limited to those within the contemplation of the parties when the contract was entered into or at least reasonably foreseeable by them at that time; consequential damages beyond the expectations of the parties are not recoverable." (*Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 515.) Witkin explains that "in the law of contracts the theory is that the party injured by breach should receive as nearly as possible the equivalent of the benefits of performance." (1 Witkin, Summary of Cal. Law (11th ed. 2018) Contracts, § 894, p. 938.)

Moghadam received the full benefit of his bargain with Chalon as contemplated by the forbearance agreement. Moghadam expressly acknowledged in the forbearance agreement that, as of July 2009, the note was in default. All the forbearance

agreement did was place a two-month moratorium on Chalon's right to foreclose on the note. The agreement expired by its terms on September 24, 2009, at which time (or any time thereafter, without further notice) Chalon had the right to foreclose on the note and commence a trustee's sale of the Lincoln Property. Moghadam continued to make interest payments on the note at the rate of 10.5 percent until March 2011, but failed to pay the note in full. When Moghadam stopped making payments on the note, the Lincoln Property was sold to Chalon at a trustee's sale for a credit bit of $1,702,931.88, leaving a deficiency on the note of $631,895.52. Since it is undisputed Moghadam never paid interest on the note at any rate higher than 10.5 percent, and since the Trust had no equity in the Lincoln Property at the time of the foreclosure and trustee's sale, Moghadam suffered no damages in connection with Chalon's alleged breach of the foreclosure agreement.

In his reply brief, Moghadam argued for the first time in either the trial court or on appeal that, in reliance on Chalon's oral promise to accept payments at the non-default interest rate of 10.5 percent, Moghadam "continued to make monthly interest-only payments at $13,650 (10.5 [percent])—payments that Moghadam would not have made had he believed that interest was accruing at 19 [percent]." Instead, Moghadam would have "walk[ed] away from the property, offering Chalon a deed in lieu [of foreclosure]." In other words, Moghadam posits for the first time on reply that, in reliance on Chalon's misrepresentations he suffered damages in the form of the interest payments he made to Chalon from the date of the forbearance agreement forward.

We must disregard Moghadam's untimely attempt to assert this theory of damages resulting from Chalon's alleged breach of

contract. " 'Ordinarily, issues not raised in the trial court proceedings are waived.' [Citation.]" (*Cruz v. Sun World Internat., LLC* (2015) 243 Cal.App.4th 367, 380.) Further, "points raised for the first time in a reply brief on appeal will not be considered, absent good cause for failure to present them earlier . . . ." (*Nordstrom Com. Cases* (2010) 186 Cal.App.4th 576, 583.) While we note Moghadam's reply brief was prepared by new counsel, Moghadam offered no explanation and provided no good cause for his prior attorneys' failure to timely proffer the argument.

B. *Misrepresentation*

The same no-damages analysis applies to Moghadam's misrepresentation claims. The essential elements of a count for intentional misrepresentation are "(1) a misrepresentation, (2) knowledge of falsity, (3) intent to induce reliance, (4) actual and justifiable reliance, and (5) resulting damage." *Chapman v. Skype Inc.* (2013) 220 Cal.App.4th 217, 230-231. "The essential elements of a count for negligent misrepresentation are the same except that it does not require knowledge of falsity but instead requires a misrepresentation of fact by a person who has no reasonable grounds for believing it to be true." (*Id.* at p. 231; Civ. Code, § 1710, subd. 2; *Gagne v. Bertran* (1954) 43 Cal.2d 481, 488; *West v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 780, 792.)

Even crediting Moghadam's allegation that Chalon negligently or intentionally misrepresented the rate of interest it intended to charge on the note and wrongfully induced Moghadam to enter into the forbearance agreement, Moghadam was required to show the existence of a triable issue of fact as to

each and every element of Chalon's misrepresentation claims—including damages—in order to avoid summary judgment. (Code Civ. Proc. § 437c, subd. (p)(2).) "Fraudulent representations which work no damage cannot give rise to an action at law." (*Nagy v. Nagy* (1989) 210 Cal.App.3d 1262, 1268.) Based on the undisputed facts discussed above, the trial court properly adjudicated the misrepresentation claims in Chalon's favor because Moghadam suffered no damages as a result of Chalon's alleged conduct.

C. *Violation of Business and Professions Code Section 17200*

The unfair competition law (UCL; Bus. & Prof. Code, § 17200 et seq.) prohibits, and provides civil remedies for, unfair competition, which it defines as "any unlawful, unfair or fraudulent business act or practice." (*Id.*, § 17200.) " '[U]nlawful, unfair or fraudulent business act[s] or practice[s]' " include breaching contracts and making negligent or intentional misrepresentations. (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 180 [§ 17200's coverage is broad and applies to " ' " 'anything that can properly be called a business practice and that at the same time is forbidden by law' " ' "].)

Two remedies are available to private litigants bringing claims under the UCL: injunction and restitution. (Stern, Bus. & Prof. C. § 17200 Practice (The Rutter Group 2019) ¶ 8:2, p. 8-1.) Moghadam's complaint sought the latter. In order to effectuate the remedy of restitution, section 17203 of the Business and Professions Code enables the court to "make such orders or judgments . . . as may be necessary to restore to any person in

interest any money or property, real or personal, which may have been acquired by means of such unfair competition." Accordingly, as it relates to this case, recovery under the UCL required proof Chalon acquired money from Moghadam through unfair or unlawful conduct such as breaching contracts or making negligent or intentional misrepresentations. (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.*, *supra*, 20 Cal.4th at p. 180.)

Having determined that Moghadam never paid interest at the default rate of 19 percent and lost no equity in the Lincoln Property, we are compelled to find that there was nothing for the trial court to restore to Moghadam under Business and Professions Code section 17200, even assuming Chalon made a misrepresentation about the applicable interest rate and that such misrepresentation was an unfair or unlawful act. Moghadam failed to meet his burden of proof, and the trial court properly entered judgment in favor of Chalon.

DISPOSITION

The judgment is affirmed. Chalon is awarded its costs on appeal.

NOT TO BE PUBLISHED

JOHNSON, J.

We concur:

ROTHSCHILD, P. J.

BENDIX, J.